

Appendix K: Legal Background

Federal Legislation

The Elementary and Secondary Education Act

ESEA explicitly calls for the participation in high-quality, yearly student academic assessments of all students [20 USC § 6311(b)(3)(C)(i)]. It also requires that these assessments provide for the reasonable adaptations and accommodations for students with disabilities – as defined in IDEA [20 USC § 1401(3)]—necessary to measure the academic achievement of such students relative to state academic content and state student academic achievement standards [20 USC § 6311(b)(3)(C)(ii)].

Federal provisions for inclusion and accommodation of ELs in state assessment and accountability systems are included in ESEA, which requires the participation of all students, including ELs and ELs with disabilities, in standards-based instruction and assessment initiatives Every Student Succeeds Act (ESSA).

Through the ESEA federal legislation, in addition to other state and local district initiatives, assessments aimed at increasing accountability provide important information with regard to:

- How successful schools are including all students in standards-based education;
- How well students are achieving standards; and
- What needs to be improved upon for specific groups of students.

There are several elements in the ESEA that hold schools accountable for educational results:

- Academic content standards (what students should learn) and academic achievement standards (how well students should learn the content) form the basis of state accountability systems. State assessments are the primary (though not necessarily exclusive) tool for determining whether schools have been successful in having students attain the knowledge and skills defined by the content standards. States must include at least 95 percent of students in these assessments, with the following two exceptions:
 - ELs in their first year in a U.S. school are not required to participate in the state’s English language arts Title 1 assessment, and are not counted in the state’s accountability system for ELA and mathematics; and
 - Up to one percent of the total number of students participating in statewide assessments, and who take alternate assessments based on alternate achievement standards, are not required to take the state’s standard Title 1 assessments and may be counted as proficient on the alternate assessments in the state’s accountability system.
- The Spring 2019 Math and ELA Assessments are available for grades 3-11.
- The accountability system is intended to measure the improvement of schools, districts, and states in achieving standards for all students and designated subgroups each year.
- Schools, districts, and states are held accountable for improvements on an annual basis through public reporting and ultimately through consequences if accountability goals are not achieved.

Students with Disabilities

Individuals with Disabilities Education Improvement Act of 2004

IDEA requires the participation of students with disabilities in state and district-wide assessments. Specific IDEA requirements include that:

Children with disabilities are included in general state and district-wide assessment programs, with appropriate accommodations, where necessary [14 USC § 1412(a)(16)(A)]. The term ‘individualized education program’ or ‘IEP’ means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes ... a statement of any individual modifications in the administration of state or district-wide assessments of student achievement that are needed in order for the child to participate in such assessment; and if the IEP team determines that the child will not participate in a particular state or district-wide assessment of student achievement (or part of such an assessment), a statement of why that assessment is not appropriate for the child; and how the child will be assessed [14 USC § 1412(d)(1)(A)(v) and (vi)].

For more information, see <http://www.ed.gov/policy>.

Section 504 of the Rehabilitation Act of 1973

Section 504 prohibits discrimination against individuals with disabilities who seek access to programs and activities provided by entities that receive financial assistance from the federal government, including organizations that receive U.S. Department of Education funding. In the public school setting, students with disabilities protected by Section 504 have the right to the aids and services required to meet their educational needs to the same extent as other students. The Act states that:

No otherwise qualified individual with a disability in the United States, as defined in 20 USC § 794(a) of this title, shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under and program or activity conducted by any Executive agency.

In school settings, Section 504 legislation guarantees and protects the rights of students with disabilities who may not have an IEP, but are still considered individuals with disabilities. The definition of a student with a disability is much broader under Section 504 than it is under the IDEA. Under Section 504, in order for a student to have a qualifying disability, a student must have a physical, sensory, or mental impairment that substantially limits one or more major life activities. The determination of a substantial limitation is made on a case-by-case basis by a group of knowledgeable persons who draw upon a variety of information in making the determination [34 C.F.R. § 104.35 (c)].

For more information on Section 504, see: <http://ed.gov/policy/rights/reg/ocr/edlite-34cfr104.html> and <http://www2.ed.gov/about/offices/list/ocr/504faq.html>.

Students Who Are ELs

The terms EL, English language learner (ELL), and Limited English Proficient (LEP) are used interchangeably. Although federal law and regulations use the term LEP, the use of the term “English learner” throughout this document in an effort not to label learners in terms of their deficiencies or limitations.

Definition of “English Learner”¹⁵

The *Elementary and Secondary Education Act (ESEA)* provides an explicit definition of what constitutes a “Limited English Proficient” student, as follows:

“...an individual — (A) who is aged 3 through 21; (B) who is enrolled or preparing to enroll in an elementary school or secondary school; (C)(i) who was not born in the United States or whose native language is a language other than English; (ii)(I) who is a Native American or Alaska Native, or a native resident of the outlying areas; and (II) who comes from an environment where a language other than English has had a significant impact on the individual’s level of English language proficiency; or (iii) who is migratory, whose native language is a language other than English, and who comes from an environment where a language other than English is dominant; and (D) whose difficulties in speaking, reading, writing, or understanding the English language may be sufficient to deny the individual — (i) the ability to meet the State’s proficient level of achievement on State assessments described in section 1111(b)(3); (ii) the ability to successfully achieve in classrooms where the language of instruction is English; or (iii) the opportunity to participate fully in society.”

Federal Legislation, Policies and Court Cases Ensuring Equal Access for ELs

Title VI of the Civil Rights Act of 1964

42 U.S.C. Section 2000d¹⁶ states that:

No person in the United States shall, on the basis of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Equal Educational Opportunities Act of 1974 (EEOA)¹⁷

EEOA of 1974 requires states and school districts to provide an equal educational opportunity to students learning English. States and districts must take “appropriate action” to “overcome language barriers,” which usually means teaching academic content in the language students understand, while also teaching them English. It prohibits discrimination against faculty, staff, and students, including racial segregation of students, and requires school districts to take action to overcome barriers to students’ equal participation.

Office of Civil Rights 1970 Memorandum¹⁸

This memorandum:

- Requires school districts to take affirmative steps to rectify language deficiencies in order to open its instructional program to national origin minority group students, where inability to speak and understand English excludes the students from effective participation in the district’s educational program.
- Prohibits school districts from assigning EL students to special education classes on the basis of criteria which essentially measure or evaluate English language skills.

¹⁵ Assessment consortia are currently collaborating to develop a comprehensive definition of “English learner,” based on the work (in process) of H. Gary Cook and Rober Linquanti.

¹⁶ Retrieved from the internet at <http://www2.ed.gov/about/offices/list/ocr/eeolep/index.html>.

¹⁷ Retrieved from the internet at <https://www.gpo.gov/fdsys/pkg/USCODE-2010-title20/pdf/USCODE-2010-title20-chap39-subchapl-part2-sec1703.pdf>.

¹⁸ Retrieved from the internet at

<http://www.k12.wa.us/migrantbilingual/k20/ensuringequaleducationalopportunitiesell.pdf>.

- Forbids specialized programs for EL students to operate as an educational dead-end or permanent track.
- Requires school districts to adequately notify language-minority parents of school activities that are called to the attention of other parents. Such notice in order to be adequate may have to be provided in a language other than English.

Lau v. Nichols (1974)

The Office of Civil Rights established a policy for the provision of equal educational opportunities for ELs based on Title VI of the Civil Rights Act of 1964. This policy was described in a memorandum in 1970:

Where the inability to speak and understand the English language excludes national origin minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.

This memorandum does not inform districts of the steps they must take to ensure equal opportunities for ELs. However, it does state that Title VI of the Civil Rights Act of 1964 is violated if:

- students are excluded from effective participation in school because of their inability to speak and understand the language of instruction;
- students are inappropriately assigned to special education classes because of their lack of English skills;
- programs for students whose English is less than proficient are not designed to teach them English as soon as possible, or if these programs operate as a dead end track; or
- parents whose English is limited do not receive school notices or other information in a language they can understand.

This policy was tested in the Supreme Court Case, *Lau v. Nichols*. In 1974, the Supreme Court upheld this law, supporting the premise that if students cannot understand the language of instruction, they do not have access to an equal opportunity education. The Supreme Court said the following:

There is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.

Therefore, equal education is only possible when students are able to understand the language of instruction.

Castañeda v. Pickard (1981)

This case established the *Castañeda* standards, a three-prong set of evaluation criteria for the adequacy of a district's program for EL students:

1. Is the program based on an educational theory recognized as sound by some experts in the field or considered by experts as a legitimate experimental strategy?
2. Are the programs and practices, including resources and personnel, sufficient to implement the district's chosen program effectively?
3. Does the school district evaluate its programs and make adjustments where needed to ensure language barriers are actually being overcome?

Recently-Arrived Students Who Are ELs

Federal 2007 non-regulatory guidance on the *Assessment and Accountability of Recently Arrived and*



Former Limited English Proficient (LEP) Students clarifies the definition of a recently-arrived EL student:

The regulations define a recently arrived LEP student as a LEP student who has attended schools in the United States for less than 12 months ... During the period within which an LEP student may be a recent arrival to the United States (during his/her first 12 months attending schools in the U.S.) a State may exempt such a student from one administration of the State's reading/language arts assessment. (p. 4)

Recently arrived ELs are required to participate in mathematics assessments, but states may exclude their results from accountability determinations for their first year in a U.S. school. Therefore, districts should make reasonable efforts to determine the date of enrollment of an EL in a U.S. school (both inside and outside of their state) and whether the student has been given this exemption previously. The policy allowing first-year EL exemption from the ELA assessment does not apply to the state-required English language proficiency (ELP) assessment; all ELs in grades K-12 must take the state-required ELP assessment, regardless of time in a U.S. school.